

Law (Migration) [2023] AATA 3587 (7 September 2023)

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Ms Sjet Fahr Law

VISA APPLICANT: Mr Manish Sen

REPRESENTATIVE: Mr Patrick Douglas (MARN: 5510149)

CASE NUMBER: 1916200

DIBP REFERENCE(S): BCC2017/3686101 BCC2019/3559018

MEMBER: T. Quinn

DATE: 7 September 2023

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:

clauses 309.211(2)(a) and 309.221(1)(a) of Schedule 2 to the Regulations.

Statement made on 07 September 2023 at 12:39pm

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner) (Provisional) – genuine and continuing relationship – validly married – applicant’s periods as unlawful non-citizen, immigration detention and previous visa application – stayed in Australia to support sponsor during mother’s illness – extended period living in different countries – financial, household and social aspects of relationship and nature of commitment – communication and sponsor’s visit to applicant’s home country and third country – sponsor’s mental health – detailed, consistent and credible evidence and supporting statements – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5F(2), 65, 338(5), 347(2)(b)
Migration Regulations 1994 (Cth), r 1.15A(2), (3), Schedule 2, cls 309.211(2)(a), 309.221(1)(a)

CASES

He v MIBP [2017] FCAFC 206
Kumar v MIBP [2020] FCAFC 16
MIBP v Angkawijaya [2016] FCAFC 5
MIMA v Lay Lat [2006] FCAFC 61
Re MIMA; ex parte Durairajasingham [2000] 168 ALR 407
Selvadurai v MIEA [1994] FCA 1105

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. On 9 October 2017, the visa applicant ('the applicant' or 'Mr Sen') applied for a Provisional Partner visa¹ ('the visa') based on his marriage to the review applicant, Ms Sjet Fahr Law ('the sponsor' or 'Ms Law').²
2. On 16 May 2019, a delegate of the Minister for Immigration ('the delegate') refused the applicant's visa application, not being satisfied that at the time of application the applicant and the sponsor were in a spousal relationship as defined by section 5F of the Act ('the delegate's decision').³
3. On 21 June 2019, the sponsor applied for a review of the delegate's decision with this Tribunal.⁴
4. The sponsor was represented in relation to the review.
5. The sponsor appeared in person and the visa applicant appeared via telephone before the Tribunal on 4 September 2023 to give evidence and present arguments. The sponsor's representative also attended the hearing in person.
6. I have proceeded to a decision to remit this case for reconsideration, having regard to all the information before me. In reaching my decision, I have considered:
 - a. all evidence given at hearing;
 - b. all material filed by or on behalf of the applicant and sponsor; and
 - c. other relevant documents on the Tribunal and Department files.

1. Not all the evidence and material that has been placed before the Tribunal has been specifically referred to in the reasons set out below. The reasons incorporate reference only to that information found to be fundamental or materially significant to the determination of the issues in the case.⁵

2. STATUTORY AND LEGAL FRAMEWORK

7. The issue in this case is whether the applicant and the sponsor are in a spouse relationship as defined by section 5F of the Act.
8. Clause 309.211(2) of the Regulations requires that at the time the visa application was made the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims that he is the spouse of the sponsor, who is a Malaysian born Australian

¹ Specifically, a Partner (Provisional) (Class UF) visa.

² Pursuant to section 65 of the *Migration Act 1958* ('the Act'). At the time of the applicant's application, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of a Subclass 309 visa are set out in Part 309 of Schedule 2 to the *Migration Regulations 1994* (Cth) ('the Regulations'). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.

³ See clause 309.211(2) of the Regulations.

⁴ Pursuant to sections 338(5) and 347(2)(b) of the Act.

⁵ In this regard, please see *Kumar v Minister for Immigration and Border Protection* [2020] FCAFC 16 (24 February 2020) at [82] and [96].

Permanent Resident. Based on the information before me I am satisfied that the sponsor is an Australian Permanent Resident.⁶

9. 'Spouse' is defined in section 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis.⁷
10. In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in clause 1.15A(3) of the Regulations are effectively questions which must be answered.⁸
11. The matters outlined in clause 1.15A(3) of the Regulations (and any other circumstances of the relationship under clause 1.15A(2)) must be considered and, to the extent relevant, applied to the applicant's case. Accordingly, I have carefully considered these matters in relation to the material and evidence before me. I recognise, however, that the Tribunal is an independent statutory body. I must therefore reach my own conclusions as to the merits of the applicant's case, which includes an assessment of how and to what extent each factor of clause 1.15A is relevant and applicable, independently of any conclusions reached by the delegate.
12. Compliance with the prescribed criteria turns on whether or not the criteria have been met and not on the objective existence of that fact.⁹ In determining whether it is so satisfied, decision makers are not required to uncritically accept any or all of the claims made by the applicants and I have not done so. A decision maker does not have to have rebutting evidence available before he or she can lawfully hold that a particular factual assertion is not made out.¹⁰
13. If a decision maker does not believe a particular witness, no detailed reasons need be given as to why that particular witness was not believed. The Tribunal must give the reasons for its decision, not the sub-set of reasons why it accepts or rejects individual pieces of evidence.¹¹
14. It is for the applicant, in this inquisitorial process, to put whatever evidence or argument they wish to a decision maker in order to enable that decision maker to reach the requisite state of satisfaction.¹²

⁶See Department and Tribunal files and evidence at hearing.

⁷Section 5F(2)(aa)-(d).

⁸*He v MIBP* [2017] FCAFC 206.

⁹*Minister for Immigration and Border Protection v Angkawijaya* [2016] FCAFC 5 at 15.

¹⁰*Selvadurai v Minister of Immigration and Ethnic Affairs and J Good (Member of the Refugee Review Tribunal)* [1994] FCA 1105 at [7].

¹¹*Re Minister for Immigration & Multicultural Affairs; ex parte Durairajasingham* [2000] 168 ALR 407 at [67].

¹²*Minister for Immigration & Multicultural Affairs v Lay Lat* [2006] FCAFC 61 at [76].

CONSIDERATION OF CLAIMS AND EVIDENCE

Valid marriage

15. If Mr Sen and Ms Law ('the applicants') are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The applicants have filed a copy of their Marriage Certificate with the Tribunal which indicates they were married on 27 June 2017.¹³ On the evidence, the applicants were married to each other under a marriage that is valid for the purposes of the Act as required by section 5F(2)(a).

3. Concerns Regarding Applicant's Migration History

16. The applicant has a troubled and concerning migration history which raised concerns about his character and credibility, and which was explored at hearing. The applicant resided onshore as an unlawful non-citizen from 2 May – 13 August 2013 following his unsuccessful student visa application with his first wife. He then remained onshore again unlawfully from 20 May-28 July 2014 following his unsuccessful [visa] application with his first wife. He then remained onshore unlawfully, most concerning, from 26 February 2015-31 May 2017 – a period of over two years. He gave evidence that he had continued to work onshore during this period. I am very troubled by this history.
17. The applicant was apprehended at his workplace and placed in immigration detention on 31 May 2017. He was granted a brief bridging visa upon his release – in which time he married the sponsor – before returning to his home country of Nepal on 4 July 2017.
18. I enquired about this history with the applicant at hearing and expressed the prima facie concerns it raised about his credibility and character. The applicant answered in a genuine forthright manner questions about his previous student and [visa] applications. He gave forthright evidence that he had continued to work while living onshore unlawfully. He gave evidence that he had been badly advised about his continued residence from 2015-2017 and that he lost everything. He took responsibility for the mistakes he had made and expressed remorse. He gave evidence that he did not know what to do. In this regard I note the evidence on the Department and Tribunal files indicating that the sponsor and applicant received advice that if the applicant departed the country the time before they could be reunited was uncertain. It appears that this reality was part of the reason for the applicant's continued unlawful residence onshore – the couple did not want to be separated.
19. I am bound to consider the evidence of the case before me which is the marriage between the sponsor and applicant who appeared before me and whether that evidence supports a finding that they are in a genuine spousal relationship. In the context of the evidence as set out below, I do not consider the applicant's unlawful residence onshore can reasonably be held against this couple in circumstances where they are in a genuine spousal relationship and have now been physically separated for over six years.

4. Timeline

20. The sponsor first arrived in Australia when she was two years old. She has been a permanent residence of Australia for many years but has delayed becoming an Australian citizen due to a sense of cultural ties to Malaysia. She explained this at hearing in her evidence.
21. The sponsor married her first husband in October 2004. There are no children of this marriage.

¹³See Marriage Certificate in the Department file.

22. The applicant married his first wife in October 2008. There are no children of this marriage.
23. The applicant first arrived in Australia in February 2009 as a dependent on his first wife's student visa.
24. The sponsor divorced her first husband on 17 October 2013 and has provided a copy of her divorce certificate.
25. The applicant divorced his first wife on 13 November 2014 and has provided a copy of his divorce certificate.
26. The couple first met in early November 2014 when the sponsor moved in with her mother who lived next door to the applicant and knew him well. They became friends and commenced a relationship over time and committed to a shared life in February 2016.
27. The sponsor's mother was diagnosed with cancer in late 2014 and the applicant was actively involved and supportive in her care until his departure in 2017.
28. As stated above, the applicant was taken into immigration detention on 31 May 2017.
29. The applicants made a partner visa application on 21 June 2017 which was invalid as it was not made within the required timeframes.
30. The couple were married on 27 June 2017.
31. The applicant departed Australia for Nepal on 4 July 2017.
32. The sponsor visited the applicant in Nepal in July 2019, and they held a wedding ceremony with the applicant's family.
33. The couple planned a trip to Singapore together in early 2020 which was cancelled due to the COVID19 Pandemic.
34. The sponsor visited the applicant in Nepal for five weeks in May 2022.
35. The sponsor resigned from her job in Australia to take an extended trip to Nepal to be with her husband in late 2022. The sponsor visited the applicant in Nepal from 7 December 2022 until late February 2023.
36. The applicant has been granted a working visa in New Zealand and moved to that country in February 2023.
37. The sponsor visited the applicant in New Zealand for one week in April 2023.

Financial aspects of the Relationship

38. Financial aspects of the relationship including joint ownership of assets; joint liabilities; extent of pooling of financial resources; any legal obligations owed to the other party; and any sharing of day-to-day household expenses must be considered when assessing the financial aspects of the relationship.
39. The applicants have filed evidence of many money transfers from the sponsor to the applicant during their relationship, as the applicant has had periods of unemployment in Nepal.

40. The applicants gave consistent evidence that the sponsor's family owns the two-bedroom apartment she lives in and that the applicant would move into that residence if he moved to Australia. They gave consistent evidence that the sponsor does not pay rent or a mortgage for this property but covers the rates and body corporate costs.
41. The applicants gave consistent evidence about the type, days, hours and remuneration they each receive in their current jobs. They gave consistent evidence about the work that the applicant will seek if he moves to Australia.
42. The applicants have filed evidence of superannuation beneficiary nominations to each other.
43. There is limited pooling of financial resources and sharing of day-to-day expenses in this case, although I acknowledge the consistent evidence about financial circumstances and future plans.
44. The applicants do not have any joint ownership of assets; joint liabilities; or any legal obligations owed to each other.
45. I acknowledge the restraints of residing in separate countries and place some weight in favour of the applicants in relation to the financial aspects of the relationship.

5. Nature of the Household

46. Any joint responsibility for the care and support of children, the living arrangements of the persons and any sharing of the responsibility for housework are matters to be considered when assessing the nature of the household.
47. The applicants gave consistent evidence at hearing about living together during the sponsor's trips to visit the applicant, including their residence together at a hotel in 2019 because the sponsor had been accompanied by an elderly friend on that trip and they did not want her to have to stay in Nepal alone. The applicant was able to refer to this friend by name at hearing. The sponsor has provided a very detailed and persuasive summary of the couple's living arrangements during her extended trip to Nepal earlier this year in her statutory declaration of 19 April 2023. This statutory declaration expressed the level of detail one would expect of a genuine couple, including the names of board games played with the applicant's children and day to day events such as prayer and exercise. I found it very convincing.
48. The applicants gave consistent evidence about their respective living arrangements, including the applicant's recent move in New Zealand to his own studio apartment. They gave consistent evidence about how they spent their time together in New Zealand (which was not included in any of the material on the Tribunal file given how recent it was).
49. The applicants gave consistent evidence about their desire for children, the challenges they may face in this regard due to their age and their plans if they are unable to conceive naturally. They gave consistent evidence that they had not tried to have children when spending time together over the last six years, when the sponsor has visited the applicant. The applicant gave evidence that this was because they had not realised it would take this long to have their partner visa finalised and they were not in a good financially position. The sponsor gave evidence that this was because she could not raise a child by herself due to her mental health.
50. The applicants have filed evidence of daily text messages and video calls along with photos together and together with friends and family – at home and out and undertaking joint

activities. They have also filed photos from their wedding in Australia and their wedding ceremony in Nepal.

51. The applicants have filed hundreds of pages of daily text message correspondence and video calls and it is clear they communicate on a daily basis, often several times per day. Notably, there are gaps in these text message during the sponsor's visits to the applicant which I consider is consistent with a genuine relationship and demonstrates that these text messages are not contrived to bolster their migration case.
52. The applicants gave consistent evidence about the type, days, hours and remuneration they each receive in their current jobs. They gave consistent evidence about the work that the applicant will seek if he moves to Australia.
53. I acknowledge the restraints of residing in separate countries and have placed weight in the applicants' favour in relation to the household aspects of the relationship.

6. Social Aspects of the Relationship

54. Whether the applicants represent themselves to other people as being married to each other, the opinion of the applicants' friends and acquaintances about the nature of the relationship and any basis on which the applicants plan and undertake joint social activities are relevant matters to be considered in determining the social aspects of the relationship.
55. The applicants have filed many photos of the applicant and the sponsor undertaking shared activities, travel, at home together, out with others and photos from their wedding in Australia and wedding ceremony in Nepal. They gave consistent evidence that there was no ring exchange on their engagement and that although they exchanged rings at their wedding, they do not wear their rings for practical reasons. In this regard, they both gave evidence that the applicant is a baker and cannot wear a ring in that field of work and the sponsor gave evidence that wearing a ring is not good when she's doing things like the dishes. This is consistent with the photos in almost all of which both members of the couple are not wearing rings.
56. The applicants gave consistent evidence at hearing about how they met and their respective marital histories including the sponsor's first husband's serious mental health issues.
57. The couple have filed social media evidence supporting public presentation and acknowledgement of their relationship, with photos of them together being posted and liked by over one hundred 'friends' on Facebook.
58. The sponsor has visited the applicant in Nepal and New Zealand a total of four times and one of these trips included an extended stay of over two months. The couple have filed letters from the sponsor's medical practitioners and employer corroborating the existence of the relationship.
59. The applicants have filed many statutory declarations including from both of their mothers and from the applicant's sisters. They have also filed evidence of correspondence between the applicant and friends of the sponsor when the sponsor has not been well regarding her mental health, along with general greeting that indicate the applicant is on friendly terms with the sponsor's friends in Australia. The applicants have also filed evidence of correspondence between the sponsor and the applicant's sisters which indicate the sponsor is on friendly terms with her sisters in law. The applicants gave consistent evidence that the sponsor's mother died in 2018 and the sponsor is not particularly close with her remaining family which includes a sister and brother in Australia and a brother and her father in

Malaysia. The applicant was well versed in the sponsor's family members' whereabouts and the status of their relationship with the sponsor.

60. I acknowledge the restraints of residing in separate countries. I place weight in favour of the applicants in relation to the social aspects of the relationship.

7. Nature of the applicant and the sponsor's commitment to each other

61. The duration of the relationship, the length of time during which the parties have lived together, the degree of companionship and emotional support that the parties draw from each other and whether the parties see the relationship as a long term one are all aspects to be considered in determining the nature of the parties' commitment to each other.
62. The applicants have been married for over seven years and their regular text message and phone call exchanges (as evidenced in the Department and Tribunal file) seem to express love and concern for each other and a sharing of day-to-day life. Notably, there are gaps in these text message during the sponsor's visits to the applicant which I consider is consistent with a genuine relationship and demonstrates that these text messages are not contrived to bolster their migration case.
63. The applicants gave consistent evidence about the sponsor's troubled mental health journey which has been very challenging for the sponsor and has involved trips to the hospital on occasion. It was clear from her evidence at hearing that her mental health episodes are so severe and traumatic that it was difficult for her to recollect the details or regularity of these events. She was forthright in her evidence and I found her to be a credible witness – making concessions where appropriate and being direct about not knowing or not being able to remember where that was the case. It was very clear from the evidence at hearing that the applicant has been an enormous support to the sponsor in the challenges she has faced with her mental health and that his physical presence would help her enormously. They gave consistent evidence that the sponsor would consider moving to New Zealand to be with her husband if necessary but given she has lived in Australia since she was two years old, she would be sacrificing a crucial social support network in Australia to do so. The applicant was able to answer in detail questions about his wife's mental health, the type of medication she takes, her symptoms and the impact it has on her life. There is medical evidence on the Department and Tribunal files to support the evidence given in relation to the sponsor's mental health. I found the evidence given at hearing by the applicant and sponsor in relation to the sponsor's mental health and the applicant's support very persuasive in relation to a genuine spousal relationship. I consider the couple draw enormous emotional support from each other and that it has been incredibly challenging for them to be separated for such an extended period, particularly given their plans for a family and the impact such a lengthy delay may have had on that goal.
64. The sponsor has visited the applicant in Nepal and New Zealand a total of four times and one of these trips included an extended stay of over two months. The couple have filed letters from the sponsor's medical practitioners and employer corroborating the support the applicant gives the sponsor in their relationship.
65. I had some concerns about the timing of the applicant's divorce from his first wife and the proximity of his divorce to his meeting the sponsor (as set out in paragraphs 25 and 26 above). These concerns were allayed by his answers given at hearing, including that he had been separated for some time before his official divorce in November 2014, and evidence in Department records in relation to his first wife's immigration history. I accept that the applicant's first marriage had ended practically when the applicant and the sponsor met, and that the sponsor's mother never met the applicant's first wife when the applicant was living next door to her.

66. Although never to be condoned, I consider the applicant's decision to stay onshore unlawfully between 2015-2017 was made based on a desire to support the sponsor during her mother's battle with cancer and her mental health challenges, which had worsened with her mother's diagnosis and subsequent symptoms related to her cancer. The evidence of the applicants' residence over these two years raises concerns about his respect for migration laws but also, in the context of all of the evidence before me (including evidence given at hearing), supports a conclusion that his relationship with the sponsor is a genuine one.
67. The applicants gave relatively consistent evidence about the sponsor telling the applicant about her mental health diagnosis and when it had started and the applicant telling the sponsor about his unlawful status onshore and her anger about this. I found the evidence on this topic – from both the applicant and the sponsor - authentic and credible.
68. The sponsor has visited the applicant in Nepal and New Zealand a total of four times and one of these trips included an extended stay of over two months.
69. The applicants have filed hundreds of pages of daily text message correspondence and video calls and it is clear they communicate on a daily basis, often several times per day.
70. The applicants gave consistent evidence about their desire for children, the challenges they may face in this regard due to their age and their plans if they are unable to conceive naturally.
71. I find the evidence of the applicants' commitment to each other very powerful and have placed weight in their favour accordingly.

8. Conclusions

72. I have carefully considered all of the evidence before me. I am very concerned about the applicant's immigration history as set out above. I have considered the possibility that there are aspects of the applicants' marriage and relationship motivated by securing a migration outcome for the applicant. The Full Federal Court has held that people enter into marriages with a variety of purposes and motives. It is not necessarily inconsistent with a genuine marriage relationship that it was entered into by one or both parties with a view to material benefit or advancement, as for example with the hope of becoming eligible to reside in a particular country.¹⁴
73. The evidence before me, including evidence given at hearing, is very persuasive. I found the sponsor and the applicant to be credible witnesses who made concessions where appropriate and had intimate knowledge about each other reflective of a genuine relationship. I find that the applicant and the sponsor have a mutual commitment to a shared life to the exclusion of others and that their relationship is genuine and continuing and that they live together, not separately and apart, on a permanent basis. I am satisfied that the applicant is in a spouse relationship with the sponsor and the applicant therefore satisfies clauses 309.211(2)(a) and 309.221(1)(a) of Schedule 2 to the Regulations.
74. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

75. The appropriate course is for this matter to be remitted for reconsideration by the Department.

¹⁴ *Re MILGEA and Dhillon* [1990] FCA 144.

76. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that: the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: clauses 309.211(2)(a) and 309.221(1)(a) of Schedule 2 to the Regulations.

T. Quinn
Member

9. ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).